

“locality” of the called party is a futile exercise with regard to retail rating wireless paging calls. ASAP argues that CenturyTel only uses locality when it suits its interest, and suggests that CenturyTel would not agree that a cell phone call is local when it goes from a caller in San Marcos to a party with an *Austin* number who is physically present in *San Marcos*. Rather, CenturyTel would require 1+ dialing and impose toll, and ASAP states that all ILECs would use the called NXX to retail rate the call.<sup>76</sup>

ASAP also rejects CenturyTel’s proposal to retail rate calls based on the location of ASAP’s switch, paging terminal, or transmitters. It argues that CenturyTel merely uses those locations because they yield the rating result that CenturyTel wants. Further, ASAP states that retail rating and carrier compensation for calls to *paging customers* have never been based on the called party’s location, because that location cannot be determined.<sup>77</sup> Usually, the paging customer will select a desired rate center based on the location of persons from whom the customer expects to receive paging calls.<sup>78</sup> According to Mr. Gaetjen and Mr. Goldstein, the industry has always used the called NXX for purposes of retail rating to the calling party.<sup>79</sup>

ASAP also disagrees with Staff’s position that ASAP is not entitled to “participate” in ELCS because it has not entered into an interconnection arrangement with CenturyTel and has not established a facility to take calls within the ELCS calling areas.<sup>80</sup> ASAP argues that Staff is incorrect for two reasons. First, ASAP states that it is not seeking to “participate” in ELCS as Staff

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<sup>76</sup> ASAP Initial Brief at 18, n. 43.

<sup>77</sup> Int. Hng. Tr. at 34, 35, 50, 108, 164.

<sup>78</sup> Int. Hng. Tr. at 199.

<sup>79</sup> Hng. Tr. at 198-99, 274.

<sup>80</sup> Staff Initial Brief at 2.

suggests. Instead, ASAP requests that CenturyTel honor *its* ELCS obligation to CenturyTel end users so they can call Kyle, Fentress, and Lockhart numbers as required by the CenturyTel tariff.

ASAP also rejects CenturyTel's argument that the FCC *Mountain Communications (Mountain)*<sup>81</sup> and *TSR Wireless (TSR)*<sup>82</sup> cases authorize CenturyTel to charge its customers toll for calls to ASAP's NXXs. ASAP agrees with the statement in these decisions that a LEC may charge its customers toll for toll calls to a CMRS paging customer. But ASAP states that this begs the question of whether calls to ASAP's NXXs should be rated as local or toll.

ASAP notes that in *TSR*, the FCC contrasted "local" for retail purposes and for wholesale purposes and explained when the ILECs can charge toll at retail:

31. Section 51.703(b) concerns how carriers must compensate each other for the transport and termination of calls. It does not address the charges that carriers may impose upon their end users. . . . Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules. . . . *This may result in the same call being viewed as a local call by the carriers and a toll call by the end-user.* For example, to the extent the Yuma-Flagstaff T-1 is situated entirely within an MTA, . . . U S West must deliver the traffic to TSR's network without charge. However, nothing prevents U S West from charging its end users for toll calls completed over the Yuma-Flagstaff T-1.[note 107: *We assume for the sake of this argument that a call from Yuma, Arizona to Flagstaff, Arizona would be billed as a toll call to the caller placing the call.*] <sup>83</sup>

ASAP complains that CenturyTel wrongly interprets this paragraph to mean that it can

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<sup>81</sup> *Mountain Communications, Inc. v. Qwest Communications Int'l, Inc.*, File No. EB-00-MD-017, F.C.C. 02-220.

<sup>82</sup> *TSR Wireless, LLC v. USWest Communications, Inc.*, Memorandum Opinion and Order, File Nos. E-98-13, E-98-15, E-98-17, E-98-18, F.C.C.-194 (rel. Jun. 21, 2000).

<sup>83</sup> *Id.* at ¶ 31 (Emphasis added by ASAP).

charge toll to its users when they call a local ASAP NXX.<sup>84</sup> But, maintains ASAP, the FCC expressly *assumed that the call in question was toll*. Thus, because Yuma and Flagstaff were not in the same local calling area, the FCC held that US West could impose toll charges on its retail users even though the call was “local” for wholesale purposes because they were within the same MTA.<sup>85</sup>

In summary, ASAP agrees that CenturyTel could charge its customers toll if calls from San Marcos to ASAP’s NXXs were properly rated as toll. But since ASAP’s NXXs are associated with exchanges that are ELCS to San Marcos, ASAP argues that such calls are properly rated as local and CenturyTel cannot charge its end-users toll.

## (2) CenturyTel’s Position

CenturyTel presented a lengthy argument containing a great deal of discussion about interconnection agreements, its relationship with ASAP, intercarrier compensation, and reclaiming NXXs. The ALJ has included some of that discussion in this PFD to the extent it is helpful, but the ALJ emphasizes that the issue to be decided in this case is whether calls to ASAP’s NXXs are eligible for ELCS or whether they are subject to toll charges. Interconnection agreements, intercarrier compensation, and reclamation of NXXs are not at issue in this case.

The essence of CenturyTel’s argument is that retail rating should be based on the location of the called and calling parties. But because the location of a called wireless paging customer cannot be determined, CenturyTel contends that the location of ASAP’s paging terminal in Austin – where the landline service terminates – should serve as a proxy for the paging customers’ location. Further, with respect to calls to ASAP’s ISP customers, CenturyTel states that the calls are

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<sup>84</sup> CenturyTel Exh. 3 (Robinson Dir.) at 10.

<sup>85</sup> MTA stands for Major Trading Area.

terminated to the ISPs—the called party—in Austin. Therefore, since calls from San Marcos to Austin are intra-LATA long distance, CenturyTel argues that calls to ASAP's NXXs should be retail rated as long distance, regardless of the exchange with which ASAP has "associated" its NXXs. The ALJ has divided CenturyTel's argument with respect to CMRS paging traffic and calls to ISPs.

(a) CMRS Traffic

CenturyTel argues that ASAP's NXXs are "virtual" NXXs (VNXXs) and that the Commission has rejected the use of VNXXs in determining the jurisdictional nature of a call. Consequently, jurisdiction should be determined by the location of the calling and called parties. It contends that FCC rules and orders for determining the jurisdiction of CMRS traffic use the location of the called mobile service customer (or alternatively, the location of the CMRS provider's terminal) to determine whether a CMRS call is local for purposes of intercarrier compensation. Likewise, it asserts that the Commission should use the location of the parties to determine whether an ILEC may charge a toll when its end-users call to a mobile customer.

CenturyTel suggests that only ASAP can provide information on how many calls actually reach a paging customer in an ELCS exchange, but ASAP states this is impossible to determine. It is impossible because the communication is one-way and ASAP's Austin switch fires all of its transmitters simultaneously throughout the Central Texas area (and perhaps nationally by means of a satellite link) and the paged customer could be anywhere within the range of ASAP's terminals or satellite signal.<sup>86</sup> CenturyTel states that under these circumstances (where the location of the called party cannot be determined), it is customary to negotiate some method of allocating calls by jurisdiction for intercarrier compensation purposes. CenturyTel says it has offered to do so, but

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<sup>86</sup> Tr. at 25-30

ASAP has refused, claiming that it has no obligation to negotiate an interconnection agreement with CenturyTel.<sup>87</sup>

CenturyTel discusses the FCC's *Local Competition Order*<sup>88</sup> at length to argue that ASAP's paging services are not "local" for purposes of intercarrier compensation. The order defines local and long-distance traffic separately for general landline telecommunications and for CMRS. With respect to landline traffic, the order provides that "state commissions have the authority to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation obligations . . . , consistent with the state commissions' historical practice of defining local service areas for wireline LECs."<sup>89</sup> Thus, CenturyTel states, for *landline traffic*, the order looks to state law to distinguish between local traffic subject to reciprocal compensation and interexchange traffic subject to access charges.

For CMRS traffic, such as ASAP's paging service, the *Local Competition Order* provides that traffic that originates and terminates in the same MTA (*intra-MTA*) is subject to local transport and termination compensation rather than long-distance access charges, and that *inter-MTA* CMRS traffic is subject to long-distance access charges. Further, the order acknowledges that it may be difficult to determine the mobile party's location. Therefore, it suggests two alternative methods for determining the nature of a CMRS call for purposes of intercarrier compensation:

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<sup>87</sup> CenturyTel Ex. 1 at 0030, 0035.

<sup>88</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. -96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8<sup>th</sup> Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *aff'd in part and remanded, AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), *further recons. pending*.

<sup>89</sup> *Id.* at ¶ 1035 (emphasis added). The ALJ notes that this paragraph goes on to state: "We lack sufficient record information to address the issue of expanded local area calling plans; we expect that this issue will be considered, in the first instance, by state commissions."

We conclude, however, that it is not necessary for incumbent LECs and CMRS providers to be able to ascertain geographic locations when determining the rating for any particular call at the moment the call is connected. We conclude that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples. For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer. *As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.*<sup>90</sup>

In CenturyTel's view, this requires use of the physical location of the calling and called parties, or a proxy for such location, to determine when long distance access charges (rather than local-call reciprocal compensation) will apply to LEC/CMRS traffic.<sup>91</sup> CenturyTel next cites the deposition testimony from Mr. Robinson, a SWBT employee, that if ASAP's *transmitter locations* in the Dallas, San Antonio, and Houston MTAs are used as a proxy for the called party's location, then ASAP's paging traffic from CenturyTel's San Marcos exchange is *inter-MTA* to a significant degree.<sup>92</sup> And CenturyTel emphasizes that an ASAP paging customer with a Kyle, Lockhart, or Fentress NXX could be located anywhere within the broad geographic area of these MTAs when receiving a page,<sup>93</sup> or perhaps even more distant if the paging customer chose an ASAP satellite-based service.<sup>94</sup>

CenturyTel argues that these facts require rejection of ASAP's position that all traffic to its Kyle, Lockhart, or Fentress numbers is "local" in nature. It emphasizes that none of these FCC orders use the NXX to determine the jurisdiction of a CMRS call. Applying what it argues is the

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<sup>90</sup> *Local Competition Order* at ¶ 1044.

<sup>91</sup> *Id.*

<sup>92</sup> CenturyTel Ex. 3B (Robinson Supp. Direct) WR-6.

<sup>93</sup> Tr. at 21-30.

<sup>94</sup> *Id.* at 26.

relevant test, CenturyTel states that a significant portion of ASAP's paging traffic terminates to a location outside the MTA where the call originated, and that these calls should be considered interMTA in nature and rated as non-local *for intercarrier compensation purposes*.<sup>95</sup>

CenturyTel adds that FCC decisions also make clear that CenturyTel can charge its own end users toll charges when they place an *intraMTA* call to a mobile customer located *outside of CenturyTel's local calling area*, even though such a call is considered local for intercarrier compensation purposes. It cites the same language quoted by ASAP that "nothing prevents a LEC from charging its own end users for intraLATA toll calls that originate on its network and terminate over facilities that are situated entirely within a single MTA." To avoid these charges to the end user, a paging carrier like ASAP can enter into a wide-area calling plan or reverse toll billing option, so that such calls will appear as local calls to the calling party. Indeed, CenturyTel points out that this is exactly what ASAP did when it entered a wide-area calling plan with CenturyTel, SWBT, and Verizon in connection with ASAP's 512-222 numbers.

CenturyTel reiterates that, as discussed above, for wireless calls, the FCC looks to physical location of the originating caller and of the mobile customer to whom the call terminates to determine the jurisdiction of the call. In the *TSR Wireless Order*, the FCC, applied similar principles to paging traffic and adopted the physical location of the *paging terminal* as the location of the rate center of the party to whom a paging call is placed. It states: "*a paging terminal performs a terminating function because it receives calls that originate on the LEC's network and transmits the calls from its terminal to the pager of the called party. This is the equivalent of what an end office switch does when it transmits a call to the telephone of the called party.*"<sup>96</sup> Thus, the FCC orders

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<sup>95</sup> The relevance of this to retail rating—which is at issue in this case—is not entirely clear to the ALJ. CenturyTel is presumably arguing (but does not expressly say so) that calls to ASAP's paging customers should be rated as long distance for retail rating purposes since, under CenturyTel's theory, it would be rated long distance for intercarrier compensation. CenturyTel uses this argument to discuss intercarrier compensation, but that question is not at issue in this case.

<sup>96</sup> *TSR Wireless Order* at ¶ 22 (emphasis added).

look to the actual geographic location of the paging customer or, if not available, the *location of the paging terminal* that transmits the page to the paging customer, to determine the jurisdiction of the call.

CenturyTel adds that the Arbitration Award in Docket No. 24015 rejected AT&T's proposal to use the rate center to which the NPA/NXX is assigned to establish whether a call is toll or local.<sup>97</sup> First, the Arbitrators found that in the Commission's prior arbitration proceeding in Docket No. 21982, "The Commission defined local calls based on physical locations of the end users rather than the assignment of NPA-NXXs."<sup>98</sup> The Arbitrators then rejected AT&T's VNXX proposal:

The Arbitrators reject AT&T's proposal to use the rate center to which an NPA-NXX is assigned to rate calls for compensation purposes . . . . Since there is no longer a correlation between the geographic location of the customer and the NPA-NXX, rating calls for compensation purposes via the rate center to which the NPA-NXX is assigned creates an opportunity for regulatory arbitrage.<sup>99</sup>

And the Arbitrators cited the very example that exists under the ASAP proposal as an example of the regulatory arbitrage that could result:

For example, carriers could assign NPA-NXXs to customers geographically outside of the mandatory local calling area, . . . thereby bypassing the access charges that might otherwise apply.<sup>100</sup>

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<sup>97</sup> Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Inter-carrier Compensation for "FX-Type" Traffic Against Southwestern Bell Telephone Company, Docket 24015, Revised Arbitration Award ("Arbitration Award") (August 2002) at 14, 36. "AT&T asserted that it should be the rate center to which the NPA/NXX in question is assigned that determines the rating of the call for compensation purposes, and, as such, the physical location of the recipient of the call should be immaterial." *Id.* at 14.

<sup>98</sup> *Id.* at 32.

<sup>99</sup> *Id.* at 36.

<sup>100</sup> *Id.* at 36.



CenturyTel also complains that ASAP obtained its NXXs upon the representation that the numbers would be used to provide CMRS service, but that ASAP's owner testified that the 512/265 (Fentress) and 512/580 (Kyle) NXXs are actually used for landline ISP service,<sup>101</sup> and he could not confirm that *any* paging customers are served by these numbers.<sup>102</sup>

Because ASAP cannot establish the physical location of its customers when the call is placed, CenturyTel insists that the Commission should rely upon the FCC's alternative approach by designating ASAP's paging terminal or its established POI with SWBT as the termination point of a call to an ASAP mobile customer. Further, because both are physically located in Austin, and because there is no ELCS between the Austin and San Marcos exchanges, CenturyTel argues that paging traffic originated by CenturyTel and terminated to an ASAP mobile customer should not be eligible for ELCS.

In conclusion, CenturyTel argues that it may charge its end users a toll charge for traffic that terminates to an ASAP paging customer behind ASAP's Austin paging terminal, anywhere within a wide area outside of CenturyTel's San Marcos local calling area.

(b) Calls to ISP Customers

As discussed previously, CenturyTel argues that ASAP's service to its ISP customers is not CMRS or incidental to CMRS, and therefore should be treated as landline calls. And again, CenturyTel states that the determination of whether a landline call is local or toll depends upon the physical location of the calling and called party. It cites the statement in the Docket No. 24015 Revised Arbitration Award that "local traffic consists of calls that originate from and *terminate to*

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<sup>101</sup> Tr. at 60.

<sup>102</sup> Tr. at 45-46.

*end users physically located within a mandatory single or multi-exchange local calling area including associated EAS and ELCS exchanges.*"<sup>103</sup>

CenturyTel reiterates that ASAP's employment of a VNXX does not preclude application of this rule because the Commission looks to the actual physical location of the customer, not the rate center to which the NXX is associated.<sup>104</sup> CenturyTel emphasizes that ASAP hands its ISP customers their incoming traffic at ASAP's Austin switch location.<sup>105</sup> Further, ASAP's contract with its ISP customers requires that the traffic "terminate" to the ISP customer at this location, and not re-enter the public switched network.<sup>106</sup> CenturyTel adds that the fact that the called party is an ISP does not preclude it from assessing its end user a toll charge if the ISP is located outside the local calling area. For example, if a San Marcos end user calls a dial-up telephone number of an ISP located in Houston, Dallas, or New York City, no one disputes that the call is treated as any other toll call.

CenturyTel notes that there has been considerable debate as to the compensation to be paid between competing local carriers when the customer of one LEC places a local call to an ISP customer of the second LEC. In its *ISP Remand Order*, the FCC ruled that, as between the two local carriers, the intercarrier compensation for the termination of ISP traffic will be "bill and keep" (local call).<sup>107</sup> But CenturyTel stresses that this order only addresses rules for carrier interconnection, *not whether a LEC may charge its own customer a toll for a call to an ISP customer located outside the*

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<sup>103</sup> Docket 24015, Award, at 32 (emphasis added).

<sup>104</sup> *Id.* at 32.

<sup>105</sup> Tr. at 52-53; CenturyTel Ex. 3A (Confidential) at WR-2B, 00056.

<sup>106</sup> *Id.*; WR-2B.

<sup>107</sup> *ISP Remand Order, supra*, at n.70. "Termination" is used to define the function performed by the carrier at the terminating end of the call in completing the call to the called party, as distinguished from "transport" of the call, the term used to define the carriage of the call from the originating end office to the terminating end office. Local Competition Order at ¶¶ 1039, 1040.

first LEC's local calling area. Thus, even if the call is bill-and-keep for intercarrier compensation purposes, the order does not preclude the LEC from charging the end user a toll for an intraLATA call that is otherwise a toll call to the end user.

In summary, CenturyTel argues that ASAP seeks to have calls to its NXXs treated as local ELCS calls to Kyle, Lockhart, or Fentress—even though these calls actually terminate to other locations. CenturyTel's position is that such "virtual" NXXs should not be used to rate calls, and it states that this position is consistent with orders by this Commission and most other states. Further, CenturyTel argues that ASAP has provided no authority that this Commission utilizes VNXXs to determine the rating of a call.

### (3) Commission Staff's Position

Commission Staff takes a different approach and argues that calls from San Marcos to ASAP's NXXs are not eligible for ELCS treatment because ASAP has not taken the necessary steps to interconnect with the ILECS involved in the ELCS exchanges. Staff first notes that under P.U.C. SUBST. R. 26.219, only ILECs are subject to the ELCS provisions of PURA.<sup>108</sup> Non-ILECs, such as ASAP, are allowed to participate in ELCS arrangements only by taking certain steps to ensure that calls are properly routed and delivered. One option is to become certified to provide local exchange service, basic local telecommunications service, or switched access service. After a non-ILEC is certified, it can then request interconnection pursuant to P.U.C. SUBST. R. 26.272, concerning conditions for ELCS calling scope. A second option that does not require certification is entering into a transport and termination traffic agreement with an ILEC that provides ELCS. A final alternative would be for ASAP to purchase dedicated facilities to interconnect with ILEC

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<sup>108</sup> Staff Ex. 1, Direct Testimony of James W. Kelsaw, Jr. (Kelsaw Direct)) at 6.

provisioned ELCS facilities in order to allow calls from exchanges within the expanded local calling area to be delivered to and from the non-ILEC switch.<sup>109</sup>

In this case, however, ASAP does not have an interconnection agreement or traffic arrangement to allow its Lockhart, Kyle, and Fentress-associated NXXs to be included in the ELCS arrangement, provided by SWBT, Verizon, and CenturyTel. Staff also notes that ASAP does not have facilities in Lockhart needed to ensure proper routing and transport of calls from CenturyTel back to ASAP's switch in Austin.<sup>110</sup> Therefore, Staff concludes that calls from CenturyTel customers in San Marcos to ASAP customers with a Lockhart NXX are not eligible for ELCS until ASAP takes the appropriate actions to participate in the ELCS arrangement.

#### (4) ALJ's Analysis

PURA and the Commission's rules govern whether calls from San Marcos to ASAP's NXXs qualify for ELCS and local retail rating. Indeed, ELCS is created by PURA as an exception to general retail rating principles because it expands local calling areas into exchanges that are otherwise retail rated as long distance. Further, for exchanges even to be eligible for ELCS, they must meet certain requirements for geographic proximity and community of interest. Therefore, as will be discussed in more detail below, the ALJ concludes that for calls to be eligible for ELCS, they must actually originate and terminate, in some manner, within exchanges that are located in a specific ELCS territory.

ASAP has not cited any authority to support its position that a call must be rated ELCS if the called NXX is "associated" with an ELCS exchange, regardless of whether the call actually travels to or terminates within an ELCS exchange. While carriers may have traditionally relied on NXXs

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<sup>109</sup> *Id.* at 7.

<sup>110</sup> *Id.* at 10-11.

for retail rating, that was because the NXX traditionally designated the geographic location of the central office switch to which the call was routed. However, as noted in the Revised Arbitration Award in Docket No. 24015, when a carrier such as ASAP allows its customers to choose their NXX irrespective of geographic location, "there is no longer a correlation between the geographic location of the customer and the NPA-NXX."<sup>111</sup> Therefore, because ELCS eligibility has strict geographic limitations and requirements, but ASAP's assignment of its NXXs has no correlation to the geographic location of its customers, the ALJ concludes that ELCS eligibility cannot be based solely upon the NXX assigned to the customer by ASAP. Instead, ELCS eligibility depends on the location of the calling and called parties. For these reasons, the ALJ concludes that calls from San Marcos to ASAP's NXXs do not qualify for ELCS and that CenturyTel may properly charge its end-users toll for such calls.

The ALJ believes that the location of the calling and called parties determines ELCS eligibility because PURA and the Commission's Substantive Rules clearly show that ELCS was designed to serve customers within exchanges that meet specific geographic criteria. For example, PURA § 55.042 provides that ELCS is toll free local calling *between contiguous exchanges*,<sup>112</sup> and the term "exchange" is defined as "The *geographic territory* delineated as an exchange area by official commission boundary maps."<sup>113</sup> Further, PURA § 55.045 imposes additional geographic requirements for exchanges to qualify for ELCS. It requires that the central switching office of each exchange must be located within 22 miles of each other; or if a "community of interest" exists

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<sup>111</sup> Docket No. 24015, Award, at 36.

<sup>112</sup> **Sec. 55.042. CONTIGUOUS EXCHANGE.**

The commission may expand a toll-free local calling area into an *exchange* that is not in a metropolitan exchange but is in a local calling area that is contiguous to a metropolitan exchange that the commission determines has a community of interest with the exchange for which a petition is filed under this subchapter. (Emphasis added.)

<sup>113</sup> P.U.C. SUBST. R. 26.5(79), *emphasis added*.

between the exchanges, the central switching offices must be within 50 miles of each other.<sup>114</sup> Other Commission substantive rules also make clear that local retail rating is determined by geographic parameters. For example, a "local call" is defined as "A call *within* the certificated telephone utility's toll free *calling area* including calls which are made toll-free through a mandatory extended area service (EAS) or expanded local calling (ELCS) proceeding,"<sup>115</sup> and "local calling area" is defined as "The *area within which* telecommunications service is furnished to customers under a specific schedule of exchange rates. . . ."<sup>116</sup> These provisions make clear that local retail rating is based on geographic parameters, *i.e.*, calls "within a local calling area." In short, there is no authority in PURA or the Commission's rules that base retail rating solely on the called NXX, as ASAP requests, regardless of where the call begins and ends. While ASAP's witnesses and the FCC *Virginia Arbitration* state that rating has traditionally been based on the called NXX, that likely occurred because the NXX designated the exchange (geographical area) to which the call was actually delivered. In other words, the NXX usually indicated the geographic location of the switch to which the call was routed. But since this geographic correlation does not exist with ASAP's NXXs, they are not a valid basis for retail rating calls.

The evidence established that ASAP's paging territory covers a much larger territory than the San Marcos ELCS exchanges. Indeed, ASAP can even provide nationwide coverage if the customer selects such a plan. ASAP concedes that many paging calls do not reach the paging customer within the San Marcos ELCS territory, but it stresses that at least *some* pages do reach

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<sup>114</sup> (1) the petitioning exchange's central switching office is located within 22 miles . . . of the central switching office of the exchange requested for expanded local calling service; or

(2) the petitioning exchange's central office is not more than 50 miles from the central office of the exchange requested for expanded local calling service and the exchanges share a community of interest.

<sup>115</sup> P.U.C. SUBST. R. 26.5(117), *emphasis added*.

<sup>116</sup> P.U.C. SUBST. R. 26.5(118), *emphasis added*. Similarly, the definition of local access and transport area (LATA) is "A *geographic area* established for the provision and administration of communications service. It encompasses one or more designated exchanges, which are grouped to serve common social, economic, and other purposes. . . ." P.U.C. SUBST. R. 26.5(116). Newton's Telecom Dictionary also defines "local service area" as "The *geographic area* that telephones call may call without incurring a toll."

paging customers within the territory. However, the evidence suggested that only a tiny percentage of calls to ASAP's Lockhart, Kyle, and Fentress NXXs actually reach a paging customer located in the ELCS territory. First, the majority of ASAP's paging customers apparently do not even use these NXXs; instead, they use numbers from ASAP's 512-222-XXX wide area calling plan. Second, for calls that are directed to ASAP's Lockhart, Kyle, and Fentress NXXs, the overwhelming majority, based on minutes of use, are not even directed to paging customers but are directed to ASAP's ISP customers in Austin. In fact, Mr. Gaetjen testified that he did not know if *any* paging customers had been assigned numbers from the 265-Fentress NXX or the 580-Kyle NXX. Rather, they were assigned to ISP customers or were not used at all.<sup>117</sup> Under these circumstances, the ALJ concludes that it is not reasonable to treat all calls to these three ASAP NXXs as ELCS merely because a small percentage might, by chance, be received by a wireless pager within one of the ELCS exchanges.

Since it is impossible to determine where a paging call reaches the paging customer, the ALJ concludes that the location of ASAP's paging terminal should be used as the location where the call terminates for purposes of ELCS. The paging terminal is the location where the call is handed off to the paging company--ASAP--and the location where the call leaves the PSTN. Further, this is consistent with the FCC's statement in the *TSR Wireless Order* that the paging terminal can be used to determine the location of a mobile-called party for purposes of calculating intercarrier compensation. In this case, ASAP's paging terminal is also located at its POI with SWBT in Austin. Therefore, the ALJ concludes that ASAP's paging terminal in Austin is the location where calls terminate for purposes of retail rating to ASAP paging customers using ASAP's Lockhart, Kyle, and Fentress NXXs. And because Austin is not ELCS eligible for calls from San Marcos, the ALJ concludes that paging calls to these ASAP NXXs are not eligible for ELCS.<sup>118</sup>

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<sup>117</sup> Tr. at 45-46.

<sup>118</sup> The ALJ rejects CenturyTel's suggestion to use the location of ASAP's remote *transmitters* as a proxy for the termination point. Because the transmitters fire simultaneously and because the location of the pager is unknown, it is equally impossible to determine the specific transmitter from which a pager receives a page. This proposal seems to be little more than an attempt by CenturyTel to get paging calls classified as interMTA for purposes of intercarrier compensation, which is beyond the scope of this proceeding.

Likewise, the ALJ concludes that ASAP's switch in Austin is the location where calls terminate to ASAP's ISP customers for purposes of retail rating and ELCS eligibility. While the FCC has decided that calls to the Internet continue on to distant websites *for purposes of determining jurisdiction for intercarrier compensation*, the FCC has also held that a single call may be considered both long distance for purposes of intercarrier compensation and local for purposes of retail rating.<sup>119</sup> From an end-users perspective, it is understood that the "call" for purposes of accessing the Internet is the call to the ISP. Indeed, this was recognized by the Court in *Bell Atlantic Tel. Cos. v. FCC*: "Calls to ISPs appear to fit this definition [termination]: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, *which is clearly the 'called party.'*"<sup>120</sup> Although ASAP is not a LEC, the same underlying principle applies. Therefore, the ALJ concludes that calls to ASAP's ISP customers terminate at ASAP's switch in Austin for purposes of retail rating; consequently, such calls are not eligible for ELCS.<sup>121</sup>

In summary, the provisions in PURA and the Commission's rules impose strict geographical parameters for exchanges to qualify for ELCS. Under these provision, calls must originate and terminate within the designated ELCS exchanges to qualify for rating as ELCS local. In this case, however, ASAP's Lockhart, Kyle, and Fentress NXXs have no actual geographical correlation to those exchanges for determining where a call terminates. Rather, for purposes of determining retail rating, the ALJ finds that calls to these ASAP NXXs terminate at ASAP's switch in Austin, which is not ELCS to San Marcos. Therefore, the ALJ concludes that calls from CenturyTel's San Marcos customers to ASAP's Lockhart, Kyle, and Fentress NXXs do not qualify for ELCS. The Order granting interim relief should be set aside and CenturyTel should be allowed to rate such calls to its

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<sup>119</sup> *TSR Wireless Order* at ¶ 31.

<sup>120</sup> 206 F.3d 1, 6 (D.C. Cir. 2000).

<sup>121</sup> Because calls to ASAP's paging and ISP customers using Lockhart, Kyle, and Fentress NXXs terminate in Austin, rating such calls as ELCS would also violate PURA §§ 55.042 and 55.044(a)(4), which provide that *ELCS cannot be established* in "metropolitan exchanges." P.U.C. SUBST. R. 26.219(b)(4) designates Austin as such a metropolitan exchange for purposes of ELCS.



end-users as intraLATA long distance. However, the ALJ does not recommend recovery of toll lost by CenturyTel for such calls made while the Order was in effect. During that time, the Order made the calls toll-free for CenturyTel's end-users placing the calls.

c. Subissue 1: May ASAP designate the calling path the traffic takes before termination?

(1) Parties' Position

ASAP states that it has not designated the calling path for the telephone traffic to its customers. Instead, it has only issued routing instructions via the Local Exchange Routing Guide (LERG), just like every other carrier.<sup>122</sup> ASAP states that the problem in this case is that CenturyTel is attempting to dictate the calling path by demanding that the traffic utilize CenturyTel's ELCS trunks with SWBT and Verizon that connect directly from San Marcos to the Lockhart, Kyle, and Fentress exchanges. But ASAP contends that this is not feasible because SWBT will not agree to use the direct ELCS trunks between San Marcos and SWBT's Lockhart end office in order to route traffic to ASAP's end-office switch in Austin. Such an arrangement would turn SWBT's Lockhart end office into a tandem, which SWBT will not agree to do.<sup>123</sup>

ASAP also rejects CenturyTel's claim that ASAP must establish a point of interconnection in San Marcos. It states that CenturyTel relies on the Central Office Code Guidelines to assert that a carrier with an NXX must have a switch or POI in the rate center that "holds" the NXX. In other words, ASAP must have a switch or POI in Kyle, Fentress and Lockhart. But since ASAP does not have a San Marcos NXX, it states that even if CenturyTel were correct (which ASAP denies), the

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<sup>122</sup> ASAP Ex. 9 (Gaetjen Dir.) at 12-13; ASAP Exh. 10 (Goldstein Dir.) at 6, 8; Int Hng. Tr. at 155; Tr. at 864.

<sup>123</sup> CenturyTel Exh. 5 (Novak Depo.) at 34-5, 65, 70, 127.

Central Office Code Guidelines do not require ASAP to have a POI in San Marcos. Instead, according to ASAP, when CenturyTel hands off calls to ASAP's NXX at the meet point with SWBT in San Marcos,<sup>124</sup> then CenturyTel's job is done and CenturyTel has no further cost responsibility.<sup>125</sup>

In short, ASAP contends that it has not dictated a "calling path" but has merely done what all carriers do—specify its tandem homing arrangement.<sup>126</sup> It states that CenturyTel can choose any path it desires so long as the call arrives at the designated home tandem (SWBT Greenwood in Austin) for further routing to ASAP's switch.

CenturyTel responds that ASAP seeks to impose its network design upon CenturyTel. It states that ASAP uses CenturyTel and SWBT trunks between CenturyTel's San Marcos *tandem* and SWBT's Greenwood *tandem*, but then ASAP claims this toll route to Austin should be treated like a local end-office to end-office ELCS facility to Kyle, Lockhart, and Fentress. CenturyTel states that it has imposed no network structure on ASAP but has only insisted that ASAP's traffic over the Austin toll route be treated as toll. In its view, ASAP seeks to impose its characterization on this route so that its calls are treated preferentially as compared to the calls of interexchange carriers over this route, and as compared to any other carrier with whom CenturyTel exchanges ELCS traffic.<sup>127</sup>

CenturyTel states that the only physical means to transport calls from San Marcos to ASAP's switch in Austin is the common toll trunk between San Marcos and Austin. Calls to ASAP's VNXXs cannot be placed over ELCS trunks to the SWBT and Verizon rate centers for Kyle,

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<sup>124</sup> Tr. 339-40, 541, 536-7.

<sup>125</sup> Tr. 541. ASAP states that it is responsible for the transit that SWBT provides beginning in San Marcos and through the Greenwood *tandem*, and ASAP has made arrangements with SWBT to provide that transit. To the extent CenturyTel is concerned about that cost, then ASAP does not object to an express order by the Commission that CenturyTel is not responsible for the transit.

<sup>126</sup> ASAP Ex. 10 (Goldstein Dir.) at 5-6 (Discussing Type 2A interconnection), at 8 (discussing homing).

<sup>127</sup> CenturyTel Reply Brief at 24.

Lockhart, or Fentress because ASAP has no point of interconnection or switching facility in those rate centers. Likewise, ASAP has not established its own ELCS trunks with CenturyTel to receive these calls on a local basis in San Marcos. Under these circumstances, where ASAP has not established ELCS service for these NXXs with CenturyTel, and where the calls are delivered to customers outside the local calling area, CenturyTel states that it correctly treated these calls as toll calls for both routing and rating purposes.

**(2) ALJ's Analysis**

In response to the Commission's specific question, all parties seem to agree that ASAP may not designate the calling path the traffic takes before termination. But the parties dispute whether ASAP has actually designated a calling path. ASAP contends that it has merely designated a POI, which it is entitled to do as a competitive carrier. On the other hand, CenturyTel contends that there is only one feasible calling path from San Marcos to the Greenwood tandem, and that this path requires the use of "toll trunks." Therefore, CenturyTel contends that ASAP has effectively designated a calling path by locating its POI at the Greenwood tandem in Austin, and it argues that calls routed to that tandem should be rated as long distance toll.

The ALJ finds that both parties are essentially correct. That is, ASAP has not expressly "designated a calling path" in this case. Instead, it has only designated a single POI within the LATA. Although ASAP contends that CenturyTel and SWBT can use whatever calling path they wish, the evidence indicates that there is only one realistic calling path between San Marcos and ASAP's switch in Austin. Therefore, ASAP has effectively designated a calling path, as suggested by CenturyTel. However, because ASAP is legally entitled to designate a POI wherever it desires within the LATA, ASAP has not engaged in any improper conduct by locating its switch in Austin. But as discussed previously, CenturyTel is entitled to treat these calls as long distance rather than ELCS.

d. Subissue 2: If ASAP does designate the path, does the manner in which it designates the calling path impact the ELCS eligibility of the traffic?

(1) Parties' Arguments

As noted above, ASAP denies that it has designated a calling path. Instead, it has designated a location for its end-office switch and the tandem that tends that switch. Moreover, it states, this is the purpose of the LERG and is simply how the network works. ASAP suggests that the Commission's question more specifically asks whether a call must go over "ELCS trunks" before it can be "ELCS," and ASAP states that the answer is "no." First, it cites testimony from Staff-witness Kelsaw and from the CenturyTel witnesses, who agreed that there are some ELCS arrangements between ILECs that do not use ELCS direct trunks, and that the Commission ELCS rule does not mention or require the use of direct trunks.<sup>128</sup> Therefore, ASAP states, ELCS direct trunks are not a prerequisite for ELCS treatment.

Second, ASAP states that the ELCS trunks that exist between San Marcos and Kyle, Fentress, and Lockhart, respectively, are direct trunks, between two end offices.<sup>129</sup> In other words, the existing ELCS trunks that run directly between the ELCS exchanges do not connect to tandem switches that could pass traffic along to another carrier such as ASAP. Therefore, ASAP cannot use those trunks for traffic destined to its end office in Austin because SWBT will not agree to allow such use. ASAP concludes by arguing that the Commission should not let ILECs impose their network architecture on alternative carriers because of the competitive harm this would cause and because newer entrants have newer technologies.<sup>130</sup>

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<sup>128</sup> Hng. Tr. at 453, 542-3, 547, 735-6, 738, and 742.

<sup>129</sup> ASAP states that direct trunks are put in place for the convenience of the two carriers involved so that traffic between two discrete end offices can be more efficiently exchanged. These trunks are not disclosed in the LERG; they are purely "private" arrangements. Tr. at 233.

<sup>130</sup> ASAP Exh. 43 (Goldstein Reb.) at 6, 20-23.

CenturyTel states that the only physical means to transport calls originating in San Marcos to ASAP's switch in Austin is common toll trunks between San Marcos and Austin. Thus, calls to ASAP's NXXs placed over ELCS trunks to the Kyle, Lockhart, and Fentress exchanges will not terminate within those rate centers because ASAP has no point of interconnection or switching facility located within any of them. Therefore, CenturyTel argues that it is correct in treating such calls as long distance for both routing and rating purposes because they must travel over toll trunks.

**(2) ALJ's Analysis**

As discussed previously, the ALJ finds that ASAP has not expressly designated a calling path for its traffic. Instead, it has merely designated its POI within the LATA, which requires calls to its NXXs to be routed over "toll trunks" between San Marcos and Austin. But the carriers' designation of the trunks used to handle the traffic as a "toll trunk" does not determine whether the traffic is eligible for ELCS. Instead, eligibility for ELCS depends on whether the traffic originates and terminates within the ELCS territory. The ALJ has determined that calls from San Marcos to ASAP's NXXs do not qualify for ELCS, but the mere fact that ASAP's traffic travels over trunks that CenturyTel has designated as "toll trunks" does not, in itself, affect the traffic's eligibility for ELCS.

- e. Subissue 3: Is CenturyTel in violation of the Commission's order in Project No. 13267, which established ELCS between Lockhart and San Marcos?
- f. Subissue 4: Is CenturyTel in violation of its Texas General Exchange tariff?

**(1) Parties' Positions**

ASAP contends that CenturyTel has violated the Commission's order in Project No. 13267, which established ELCS between San Marcos and Lockhart, Kyle, and Fentress, as well as CenturyTel's

Texas General Exchange tariff. In ASAP's opinion, CenturyTel must recognize ASAP's Kyle, Fentress, and Lockhart NXXs and retail rate calls from San Marcos to those NXXs as local.

ASAP disagrees with CenturyTel that ASAP must "enter into an arrangement" under PUC SUBST. R. 26.272(d)(4)(A)(iii) before CenturyTel must provide ELCS to ASAP.<sup>131</sup> ASAP first argues that PUC SUBST. R. 26.272 does not apply to this case because it pertains only to certificated telephone utilities -- ILECs and CLECs. In addition, ASAP states that CenturyTel does not provide ELCS to ASAP. Rather, CenturyTel is required by tariff to provide ELCS to *CenturyTel's users*. But ASAP is not CenturyTel's customer; instead, ASAP and CenturyTel are co-carriers and peers. Further, ASAP states that it does not have to buy anything from CenturyTel in order to exchange traffic with it. In fact, ASAP states, given the direction of the traffic involved, it is ASAP that provides service (transport and termination) to CenturyTel.

ASAP also argues that a close reading of rule 26.272(d)(4)(ii) shows that CenturyTel's position cannot be justified. First, ASAP notes that the rule requires a CLEC to offer the "same minimum calling scope," but local "calling scope" considerations apply only to *outbound* calls.<sup>132</sup> However, since ASAP does not offer outbound calling, it has no "calling scope." ASAP also claims that the arrangement for calls between SWBT and CenturyTel is bill and keep on a per call basis. Therefore, ASAP argues that even if the rule applies, CenturyTel must offer ASAP a bill-and-keep arrangement, which is what ASAP has consistently proposed. It complains that CenturyTel has not

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<sup>131</sup> PUC Subst. R. 26.272(d)(3)(A)(iii) provides:

(iii) with respect to local traffic originated and terminated within the local calling area of a DCTU but between exchanges of two or more DCTUs governed by mandatory EAS arrangements, DCTUs shall terminate local traffic of NCTUs at rates, terms, and conditions that are not less favorable than those between DCTUs for similar mandatory EAS traffic for the affected area. A NCTU and a DCTU may agree to terms and conditions that are different from those that exist between DCTUs for similar mandatory EAS traffic. The rates applicable to the NCTU for such traffic shall reflect the difference in costs to the DCTU caused by the different terms and conditions.

<sup>132</sup> Tr. at 239, 260.

offered bill and keep to ASAP and, instead, is insisting that ASAP execute a written agreement, even though CenturyTel does not have a written agreement with either SWBT or Verizon.<sup>133</sup>

ASAP also argues that CenturyTel is clearly violating its tariff, which governs the relationship between CenturyTel and its end-use customers.<sup>134</sup> Under the "filed-rate doctrine," a regulated utility cannot vary the terms of its tariff with individual customers, discriminate in providing services, or charge rates other than those properly filed with the appropriate regulatory authority.<sup>135</sup> ASAP states that rule 26.207(c) incorporates this doctrine by providing that "(n)o utility shall directly or indirectly demand, charge, or collect any rate or charge, or impose any classifications, practices, rules, or regulations different from those prescribed in its effective tariff filed with the commission."<sup>136</sup>

ASAP further cites Section 3.2.1 of CenturyTel's tariff, which states that payment of the residence or business rate entitles CenturyTel's customers to make unlimited calls "within the local calling area." ASAP stresses that the tariff does not limit the calling scope only to calls to SWBT or GTE customers, or to carriers with whom CenturyTel has a written agreement; rather, it provides

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<sup>133</sup> Tr. 296-7; 304-5, 331, 439-45.

<sup>134</sup> Tr. 640.

<sup>135</sup> ASAP cites *Mincron SBC Corp. v. Worldcom, Inc.*, 994 S.W.2d 785 (Tex.App.-Hous. [1<sup>st</sup> Dist.] May 20, 1999, no writ); *Southwestern Bell Tel. Co. v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687, 692 (Tex.App.-Houston [14th Dist.] 1996, writ denied).

<sup>136</sup> Sec. 52.251. TARIFF FILINGS.

- (a) A public utility shall file with the commission a tariff showing each rate that is:
  - (1) subject to the commission's jurisdiction; and
  - (2) in effect for a utility service, product, or commodity offered by the utility.
- (b) The public utility shall file as a part of the tariff required under Subsection (a) each rule that relates to or affects:
  - (1) a rate of the utility; or
  - (2) a utility service, product, or commodity furnished by the utility.

that CenturyTel customers can make calls to those "exchanges."<sup>137</sup> Because ASAP has NXXs associated with the Lockhart, Kyle, and Fentress rate centers, ASAP argues that CenturyTel's customers are allowed by the tariff to call these NXXs on a local basis. Therefore, ASAP argues that CenturyTel violated its tariff by imposing toll on CenturyTel customers for calls to these NXXs.

CenturyTel rejects ASAP's arguments. In response, it points out that the Project No. 13267 order establishes ELCS between the San Marcos *exchange* and the Kyle, Fentress, and Lockhart *exchanges*. However, it argues that ASAP has not established that calls to the ASAP NXXs are terminated to end users within the geographic area of those ELCS exchanges. To the contrary, According to CenturyTel, the evidence shows that these numbers are not assigned based on the location of the party to whom they are assigned and that calls to these numbers can terminate virtually anywhere. Thus, CenturyTel argues that ASAP's use of VNXXs does not affect the retail rating of the traffic or its eligibility for ELCS.<sup>138</sup>

Further, CenturyTel states that if ASAP were a local exchange carrier seeking ELCS, the Commission's rules would require CenturyTel to establish the same arrangements with ASAP for its ELCS traffic as it has with SWBT for SWBT's ELCS traffic. Since that arrangement provides for dedicated end-office-to-end-office trunking facilities, CenturyTel argues that it is not required to provide anything more to ASAP. Consequently, CenturyTel states that is not obligated to treat calls to ASAP's NXXs as ELCS because they are routed outside of the ELCS calling area.<sup>139</sup>

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<sup>137</sup> Tr 331, 643.

<sup>138</sup> CenturyTel Initial Brief at 12; Reply Brief at 26-27.

<sup>139</sup> CenturyTel Initial Brief at 12.



CenturyTel also argues that its tariff does not obligate it to rate calls to ASAP's NXXs as ELCS to the Kyle, Lockhart, or Fentress exchange. CenturyTel states that its tariff does not obligate it to recognize a carrier's Virtual NXX when the call does not terminate within the ELCS territory.<sup>140</sup>

Commission Staff contends that CenturyTel did not violate the order in Project No. 13267, but that CenturyTel did violate its tariff. Concerning the Commission order in Project No. 13267, Staff states that there is no evidence that CenturyTel failed to take any actions required by the order because CenturyTel took all necessary actions to establish ELCS between the CenturyTel exchange in San Marcos and the SWBT exchange in Lockhart. In Staff's view, the only conceivable way that CenturyTel arguably came close to violating that order was in assessing toll charges to CenturyTel's customers.<sup>141</sup>

However, Staff does contend that CenturyTel violated its tariff by charging its customers a toll when they called ASAP's NXXs. Staff states that under the *filed tariff doctrine*,<sup>142</sup> CenturyTel and its customers are both bound by the relevant CenturyTel tariff and that tariff provides that calls from San Marcos CenturyTel local service customers to the Lockhart exchange are within the San Marcos ELCS local calling scope.<sup>143</sup> The tariff does not indicate that such treatment depends on any particular arrangement between CenturyTel and the carrier providing service to the Lockhart numbers. Thus, Staff concludes, because CenturyTel may not charge its San Marcos local service customers for ELCS calls, CenturyTel may not charge those customers for calls to ASAP's 512-384 Lockhart numbers.

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<sup>140</sup> *Id.*

<sup>141</sup> Staff Initial Brief at 2-3.

<sup>142</sup> Staff states that the *filed tariff doctrine* is also known as the *filed rate doctrine*. See, e.g., *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 216-17 (Tex. 2002); *Houston Lighting & Power Co. v. Auchan USA, Inc.*, 995 S.W.2d 668 (Tex. 1999).

<sup>143</sup> Tr. at 331-2; CenturyTel Local Exchange Tariff at § 3, 3<sup>rd</sup> Revised Sheet No. 2.a., as contained in ASAP Ex. 9 (Gaetjen Direct) at Ex. 3 attached to Ex. 9.